Supreme Court, U.S.
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No. 01-562

In The

Supreme Court of the United States

MORGAN WISE,

Petitioner,

v.

WANDA WISE FRYAR,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Eleventh District, Eastland, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals, Eleventh District, Eastland, Texas correctly affirmed the trial court's judgment denying Petitioner's Second Amended Petition for Bill of Review.

II. Whether minor children, who were not parties to their parents' divorce, have standing to prosecute Bill of Review action to overturn finding in parent's Final Decree of Divorce that minor children were born of the marriage.

PARTIES TO THE PROCEEDING

Petitioner is Morgan Wise ("Morgan"). Respondent is Wanda Scroggins, formerly Wanda Wise and Wanda Fryar ("Wanda"). John H. Rheinscheld is attorney ad litem for the minor children.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Wanda Wise Fryar ("Wanda") respectfully submits that the decision below correctly analyzed the facts and applied governing law in the State of Texas, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinion of the Court of Appeals. App. 2a-11a. Because the Petition omits several facts, Wanda provides the following supplemental statement as required by Supreme Court Rule 15.2.

Wanda filed for divorce from Morgan on January 10, 1996. Thereafter, Morgan filed a cross-petition for divorce, wherein he alleged to be the father of the four children born of the marriage and sought temporary custody of the four minor children. Morgan was named as the primary custodian with the right to establish the residence of the children by Temporary Orders signed by the trial court on January 31, 1996. After a jury trial ending on July 24, 1996, the jury named Morgan Sole Managing Conservator of the minor children. Morgan participated in and was represented by counsel during a temporary hearing on January 25, 1996, the jury trial regarding custody of the minor children on July 22, 1996 and the final hearing wherein the parties' divorce was granted on September 5, 1996. A Final Decree of Divorce was signed on September 13, 1996.

After Wanda sought and won a modification of the custody of the minor children in an order signed by the trial court on February 3, 1999, Morgan, for unknown reasons, and without the knowledge or sanction of the trial court or Wanda, allegedly had the three boys submit to paternity testing.

Morgan filed his initial Petition for bill of review on June 17, 1999. Subsequently, Morgan filed Individually and as Next Friend for the minor children, his First Amended Petition for bill of review and Original Petition in Suit Affecting the Parent-Child Relationship to Determine Parentage, Fraud, Civil Conspiracy, Motion to Modify Child Support, and Motion for Temporary Orders.

The trial court appointed an Attorney Ad Litem to represent the interests of the minor children and ordered that Morgan and his counsel were precluded from representing the minor children. Morgan then filed, in his individual capacity, his Second Amended Petition for bill of review, which included his Petition to Establish Parent-Child Relationship and claims for civil conspiracy and fraud.

The trial court severed all of Morgan's causes of action concerning tort claims, fraud and conspiracy, and claims filed on behalf of the children from Morgan's Second Amended Petition for bill of review for all purposes. All activity in the severed causes of action was stayed by the trial court until all appellate remedies were exhausted relative to Morgan's bill of review judgment.

The alleged DNA test results were not allowed to be admitted into evidence and Morgan's request for court sanctioned paternity testing was denied. The trial court

further reiterated during the bill of review hearing held on March 28, 2000 that no evidence would be considered other than the testimony presented at the hearing and any alleged DNA would not be considered or ordered unless Appellant's bill of review was granted.

Morgan accused Wanda of numerous "affairs" during the parties' marriage and had knowledge of circumstances prior to the parties' divorce action in 1996 that should have caused him to deny paternity and request paternity testing. His testimony at the bill of review hearing held on March 28, 2000 leaves no doubt that he had knowledge of facts prior to the birth of his first child that should have caused him to contest paternity. Morgan was represented by counsel and as a part of his preparation for his divorce hearing made a list entitled Psychological Abuse that included the following: (Wanda's) affairs in Abilene and (Wanda's) affairs in Big Spring. Morgan also testified that he found a card from Wanda to another man prior to the birth of any of the minor children the subject of his bill of review wherein Wanda offered to leave Morgan if the other man would have her. Morgan was asked at the hearing on his bill of review "if there was anything that would have prevented (him) from – to (his) knowledge, from asking for a paternity test back in 1996 during his divorce hearing?" and he answered " . . . No, ma'am".

The trial court denied Morgan's Second Amended Petition for Bill of Review. The trial court signed Findings of Fact and Conclusions of Law on September 6, 2000 and found, in part: . . . [T]he parties September 13, 1996 divorce decree adjudicating [Morgan] as the legitimate father of [the minor children] is res judicata of the legal

issue of the children's paternity; prior to their September 13, 1996 divorce, [Morgan] alleged to have knowledge of conduct by Wanda that should have caused him to contest paternity; that prior to their September 13, 1996 divorce, [Morgan] accused [Wanda] of having numerous extramarital affairs; that Morgan could have litigated the issue of paternity during the parties' divorce action in 1996; that the failure of Morgan to raise the issue of paternity was a result of his and his counsel's unexcused negligence; and, that there was no extrinsic fraud on behalf of [Wanda] that prevented [Morgan] from contesting paternity of [the minor children] during the parties' 1996 divorce proceedings. App. 1a.

The Court of Appeals, Eleventh District, Eastland, Texas affirmed the trial court's judgment.

The Texas Supreme Court denied Morgan's Petition for Review.

ARGUMENT

I. THE COURT OF APPEALS, ELEVENTH DISTRICT, EASTLAND, TEXAS CORRECTLY AFFIRMED THE TRIAL COURT'S JUDGMENT DENYING MORGAN'S SECOND AMENDED PETITION FOR BILL OF REVIEW.

The Court of Appeal, Eleventh District, Eastland, Texas correctly affirmed the trial court's denial of Morgan's Second Amended Petition for Bill of Review and is not in violation of the Fourteenth Amendment of the United States Constitution. Morgan had an opportunity to deny paternity during the parties' divorce action in

1996 and the Texas Family Code allows him another opportunity by bill of review to directly attack the prior judgment.

Texas Family Code Section 151.002(a)(1) provides that a man is presumed to be the biological father of a child if he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminates by death, annulment, or divorce or by having been declared void. App. 6a. Former Section 12.06 (now Section 160.101) of the Texas Family Code, titled Denial of Paternity, was adopted by the Texas Legislature effective September 1, 1983, and provided, in part, that a husband is entitled to deny paternity of a child who is born or conceived during the marriage. Section 160.101(a)(3) further provides that the presumption that a man is the biological father of a child under Chapter 151 may be contested by a man presumed to be the father of the child, who may contest his own or another man's presumed paternity. Both the mother and presumed father can deny paternity of a child born during the marriage. App. 8a. Morgan, by statute, was given the right to deny paternity of the parties' minor children born during his marriage to Wanda. By Morgan's own testimony, he knew of circumstances prior to his divorce in 1996 that should have caused him to contest paternity. Morgan, as a result of his own negligence, failed to raise the issue of paternity during the parties' 1996 divorce proceedings.

Section 160.007(a)(1) of the Texas Family Code bars a paternity suit with respect to a child if final judgment has been rendered by a court of competent jurisdiction adjudicating a named individual to be the biological father of

the child. App. 7a. Morgan's and Wanda's September 13, 1996 Final Decree of Divorce adjudicated him to be the father of the four minor children born during the marriage. However, Section 160.007(b) of the Texas Family Code requires that a paternity suit be stayed during the pendency of a direct attack of the final judgment adjudicating Morgan as the biological father of the minor children. App. 7a. Morgan filed a Petition for Bill of Review to directly attack his Final Decree of Divorce.

The Eleventh District Court of Appeals, Eastland, Texas correctly held that the question before the court is one of procedure. The Texas Supreme Court in *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979), outlined the trial procedure to be utilized and the burdens of persuasion to be assumed by the respective parties (in a bill of review action) as follows: First, the bill of review complainant must file a petition alleging factually and with particularity that the prior judgment was rendered as the result of fraud, accident, or wrongful act of the opposite party or official mistake unmixed with his own negligence. *Baker* at 408. The complainant must further allege, with particularity, sworn facts sufficient to constitute defense and, as a pretrial matter, present prima facie proof to support the contention. Further, the Court in *Baker* held that the relevant inquiry is not whether "the result would probably be different" on retrial. . . . Rather, a prima facie meritorious defense is made out when it is determined that the complainant's defense is not barred as a matter of law and he will be entitled to judgment on retrial if no evidence to the contrary is offered, which is a question of law for the court. If a prima facie meritorious defense has been shown, the court will conduct a trial and the burden

of pursuasion is allocated in the following manner. The complainant must open and assume the burden of proving that the judgment was rendered as a result of the fraud, accident, or wrongful act of the opposing party or official mistake, unmixed with any negligence of his own. The fact finder will determine whether the complainant has established by a preponderance of the evidence that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with negligence on the complainant's part. Conditioned on an affirmative finding to this issue, the fact finder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action. *Baker* at 409.

Later, the Texas Supreme Court, in *Beck v. Beck*, 881 S.W.2d 141 (Tex. 1989) held, "It has long been the rule that a party seeking to invoke a bill of review to set aside a final judgment must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment; (2) an excuse justifying the failure to make that defense which is based on the fraud, accident, or wrongful act of the opposing party; and (3) an excuse unmixed with the fault or negligence of the petitioner".

The Texas Supreme Court in *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) held, . . . "that relative to attacks on final judgments, fraud is classified as either extrinsic or intrinsic. Only extrinsic fraud will entitle petitioners to bill of review relief . . . that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon trial", quoting *Alexander v. Hagedorn*, 148 Tex. 565 at 574, 222 S.W.2d 996 (1950) at 1001. "Extrinsic fraud is 'collateral' fraud in the sense that

it must be collateral to the matter actually tried and not something which was actually or potentially an issue in the trial", quoting *Crouch v. McGaw*, 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940). Intrinsic fraud . . . is inherent in the matter considered and determined in the trial "where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting fraud were, or could have been litigated therein", quoting *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex.Civ.App.-Austin 1941, writ ref'd). It is particularly well established that the alleged perjury of a witness on a contested issue, which the opposing party had the opportunity to refute, is intrinsic fraud. *Crouch*, 134 Tex. at 637, 138 S.W.2d at 96.

In *Amanda v. Montgomery*, 877 S.W.2d 483 (Tex.App.-Houston [1st Dist.] 1994), a mandamus action challenging the court's order for paternity testing, the appellate court held " . . . [that] the trial court abused its discretion in ordering the parties to submit to paternity testing before [the father] fulfilled the preliminary requirements for equitable bill of review". Therefore, the Court ordered Judge Montgomery to sever the bill of review proceeding from the Motion to Modify proceeding and to vacate his order of paternity testing.

Morgan failed to carry his bill of review burden by showing he had a meritorious defense to the issue of paternity of the minor boys that he was prevented from bringing due to fraud, wrongful act or official mistake, unmixed with negligence on his part.

II. THE MINOR CHILDREN, WHO WERE NOT PARTIES TO THEIR PARENTS' DIVORCE, DO NOT HAVE STANDING TO PROSECUTE BILL OF REVIEW ACTION TO OVERTURN FINDING IN PARENTS' FINAL DECREE OF DIVORCE THAT MINOR CHILDREN WERE BORN OF THE MARRIAGE.

The minor children had no right to present a bill of review under the circumstances of this case; therefore, Morgan had no right to present a bill of review on their behalf. Further, the minor children had an Attorney Ad Litem representing their best interests and Morgan and his counsel were prohibited in an order entered on March 16, 2000 from representing the children. Morgan did not file an appeal of that order.

A bill of review must be brought by a party to the challenged judgment or decree. *Alexander v. Hagedorn,* supra; *Baker v. Goldsmith,* supra; *Montgomery v. Kennedy,* supra. The minor children were not parties to the divorce proceedings and, therefore, were not entitled to bring a bill of review proceeding. *R.H.M. by Gabert v. Messick,* 828 S.W.2d 226 (Tex.App. – Fort Worth 1992, no writ).

CONCLUSION

The Petition for Writ of Certiorari fails to demonstrate any valid grounds for review of the decision below on constitutional grounds, and should be denied.

Respectfully submitted,

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APPENDIX

NO. 40563

MORGAN ODIS WISE	§	IN THE DISTRICT
	§	COURT 118TH JUDICIAL
VS.	§	DISTRICT
WANDA ELAINE FRYAR	§	HOWARD COUNTY,
	§	TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Petitioner, MORGAN ODIS WISE, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with Rules 296 and 297 of the Texas Rules of Civil Procedure.

Findings of Fact/Conclusions of Law

1. At the time of their divorce on September 13, 1996, MORGAN ODIS WISE and WANDA ELAINE FRYAR (formerly WISE), were the parents of the following children under the age of eighteen years:

Name:	CARLI ANN WISE
Sex:	FEMALE
Birthplace:	ABILENE, TEXAS
Birth date:	03/06/85
Home state:	TEXAS
Name:	ROWDI MORGAN WISE
Sex:	MALE
Birthplace:	ABILENE, TEXAS
Birth date:	01/20/1989
Home state:	TEXAS

Name:	MARTI EUGENE WISE
Sex:	MALE
Birthplace:	BIG SPRING, TEXAS
Birth date:	03/01/1991
Home state:	TEXAS
Name:	RAULI TABOR WISE
Sex:	MALE
Birthplace:	BIG SPRING, TEXAS
Birth date:	08/31/1992
Home state:	TEXAS

2. MORGAN ODIS WISE, in his Second Amended Petition for Bill of Review, is denying paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

3. MORGAN ODIS WISE'S defense of nonpaternity is barred as a matter of law by res judicata.

4. The parties September 13, 1996 divorce decree adjudicating MORGAN ODIS WISE as the legitimate father of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE is res judicata of the legal issue of the children's paternity.

5. The finding of fact in the parties September 13, 1996 divorce decree that the minor children were born of the marriage of the parties bars MORGAN ODIS WISE from relitigating the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

6. The parties September 13, 1996 divorce decree adjudicated the issue of paternity, provided for the custody, child support, and possession of and access to ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

7. The Texas Family Code, as well as established case law, protected MORGAN ODIS WISE's right to contest paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceedings in 1996.

8. Prior to their divorce being granted on September 13, 1996, MORGAN ODIS WISE alleged to have knowledge of conduct by WANDA ELAINE FRYAR that should have caused him to contest paternity.

9. Prior to their divorce being granted on September 13, 1996, MORGAN ODIS WISE accused WANDA ELAINE FRYAR of having numerous extramarital affairs.

10. MORGAN ODIS WISE has no meritorious defense that he was prevented from bringing during the parties divorce proceedings in 1996.

11. MORGAN ODIS WISE could have litigated the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceedings in 1996.

12. MORGAN ODIS WISE failed to raise the issue of paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties divorce proceeding as a result of his and his counsel's unexcused negligence.

13. MORGAN ODIS WISE'S Second Amended Petition for Bill of Review alleged only extrinsic fraud.

14. There was no extrinsic fraud on behalf of WANDA ELAINE FRYAR that prevented MORGAN ODIS WISE from contesting paternity of ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE during the parties 1996 divorce proceedings.

15. MORGAN ODIS WISE sought and was named Sole Managing Conservator of the parties' minor children and remained Sole Managing Conservator until January 19, 1999.

16. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

SIGNED on Sept. 6, 2000.

/s/ Robert H. Moore
JUDGE PRESIDING

CAUSE NO. 99-06-40,563-CV

MORGAN WISE, INDIVIDUALLY AND AS NEXT FRIEND FOR AND IN THE INTEREST OF ROWDIE MORGAN WISE, MARTI EUGENE WISE AND RAULIE TABOR WISE, MINOR CHILDREN	IN THE DISTRICT COURT 118TH JUDICIAL DISTRICT HOWARD COUNTY, TEXAS
VS.	
WANDA ELAINE WISE FRYAR AND DEWAYNE ALEXANDER	

ORDER ON MOTION TO PRECLUDE PETITIONER FROM ACTING AS NEXT FRIEND AND BRINGING ACTION IN THE INTEREST OF THE MINOR CHILDREN AND MOTION TO DISQUALIFY ATTORNEY

On the 16th day of March, 2000, a hearing was held on Attorney Ad Litem's Motion to Preclude Petitioner from Acting as Next Friend and Bringing Action in the Interest of the Minor Children and Motion to Disqualify Attorney.

APPEARANCES

Attorney ad Litem, JOHN H. RHEINSCHELD, appeared in person and announced ready.

Movant, MORGAN ODIS WISE, appeared in person and through his attorney of record, ROBERT D. MILLER, and announced ready.

Respondent, WANDA SCROGGINS FRYAR, appeared in person and through her attorney of record, PHYLLIS ROYAL, and announced ready.

Respondent, DEWAYNE ALEXANDER, appeared through his attorney of record, Celia Trimble Boone, and announced ready.

FINDINGS

The Court finds that Movant, MORGAN ODIS WISE, and Attorney for Movant, ROBERT D. MILLER, should be precluded from representing the children, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

ORDER

IT IS ORDERED that Movant, MORGAN ODIS WISE, and Attorney for Movant, ROBERT D. MILLER, are precluded from representing the children, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE.

All other relief requested but not granted herein is denied.

SIGNED on March 27, 2000

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
Judge Presiding

Texas Family Code

§ 151.002. Presumption of Paternity

(a) A man is presumed to be the biological father of a child if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminated by death, annulment, or divorce or by having been declared void;

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§ 160.007. Suit Barred

(a) Except as provided by Subsection (b), a suit under this chapter with respect to a child is barred if final judgment has been rendered by a court of competent jurisdiction:

(1) adjudicating a named individual to be the biological father of the child; or

(2) terminating the parent-child relationship between the child and each living parent of the child; or

(3) granting a petition for the adoption of the child.

(b) During the pendency of an appeal or direct attack on a judgment described by Subsection (a), a suit under this chapter may be filed but shall, on motion of a

party, be stayed pending the final disposition of the appeal or direct attack on the judgment.

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§ 160.101. Denial of Paternity

(a) The presumption that a man is the biological father of a child under Chapter 151 may be contested by:

(1) the biological mother of the child;

(2) a person related within the second degree of consanguinity to the biological mother of the child, if the biological mother of the child is deceased;

(3) a man presumed to be the father of the child, who may contest his own or another man's presumed paternity;

(4) a man alleging himself to be the biological father of the child; or

(5) a governmental entity, authorized agency, or a licensed child-placing agency.

(b) A contest of paternity must be raised by an express statement denying paternity of the child in a party's pleadings in the suit, without regard to whether the presumed father or biological mother is a petitioner or respondent.

(c) In a suit in which a question of paternity is raised, the court shall conduct the pretrial proceedings and order scientifically accepted paternity testing as provided by this chapter.